

<b>COMPLIANCE BOARD OPINION NO. 01-2</b>
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January 12, 2001

*Andrew B. White, Chairman  
Montgomery County Fire Board*

The Open Meetings Compliance Board has considered your complaint that the Montgomery County Fire and Rescue Commission (hereafter “the Commission”) violated the Open Meetings Act in connection with meetings held on January 11 and 13, 2000. For the reasons stated below, we conclude that the Act was violated.

**I**

**Background**

Fire, rescue, and emergency medical services are provided in Montgomery County through a combination of County and local fire and rescue departments, involving both career and volunteer personnel. The Commission, established by County law, is charged with developing “effective, efficient and equitable fire, rescue, and emergency medical services County-wide, and [providing] the policy, planning, and regulatory framework for all fire, rescue and medical service operations.” §21-2(d) of the Montgomery County Code.<sup>1</sup> The Commission consists of seven voting members appointed by the County Executive and confirmed by the County Council. Two of the members must be “County career fire/rescue personnel” and two must be “volunteer local fire and rescue department personnel.”<sup>2</sup> The County Executive is to appoint career and volunteer representatives from lists provided by organizations composed of career fire or rescue personnel, when there is a career member vacancy, and by the Fire Board, when there is a volunteer member vacancy. §21-2(a)(1) and (2). The Fire Board consists of the chief and president of each local fire and rescue department in the County. §21-4(a).

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<sup>1</sup> All statutory references in this part of the opinion are to the Montgomery County Code, 1994 Edition, as amended.

<sup>2</sup> The remaining three voting members “must have no personal, family, or business connection with the County volunteer or career fire and rescue services.”

The County Fire Administrator is in charge of the Montgomery County Fire and Rescue Service, which is a department of County government. It consists of two divisions, the Division of Volunteer Fire and Rescue Services and the Division of Fire and Rescue Services. §2-39A(b). The Administrator also chairs the Commission, serving as an ex officio, nonvoting member. §§21-2(a)(3) and 21-3(b).

County law requires that the Commission adopt by regulation an integrated emergency command structure (“IECS”). To improve public safety, the IECS may be amended by the Commission. However, an amendment requires approval by at least five members of the Commission. §21-8. Both meetings at issue involved, at least in part, a proposal to modify the IECS.

## **II**

### **Complaint, Response, and Informal Conference**

Your complaint on behalf of the Montgomery County Fire Board alleged that the Commission violated the Open Meetings Act by conducting two closed meetings during the month of January 2000. Specifically, you alleged that four or five members of the Commission met at approximately 4:30 P.M. on January 11, 2000, to discuss proposed changes to regulations concerning the IECS. You also alleged that the Act was violated during a “uncharacteristic dinner meeting” on January 13, 2000, held prior to a scheduled meeting of the Commission that evening.

In a timely response prepared by Associate County Attorney Richard H. Melnick on behalf of Gordon Aoyagi, the Montgomery County Fire Administrator and Chairman of the Commission, Mr. Aoyagi denied any violation of the Open Meetings Act.<sup>3</sup> After receipt of the complaint and response, and in accordance with §10-502.5(e) of the State Government Article,<sup>4</sup> the Compliance Board held an informal conference with both parties as well as others with an interest in this matter in order to clarify what happened during the two gatherings. Scheduling difficulties delayed the informal conference until December 14, 2000.<sup>5</sup>

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<sup>3</sup> The response made clear that it reflected the Fire Administrator’s view of the discussions at issue and was not to be considered a legal opinion of the Office of the County Attorney.

<sup>4</sup> All statutory references in this part of the opinion are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

<sup>5</sup> This scheduling delay accounts for the lengthy time span between the meetings at issue and the issuance of this opinion.

In his response, the Fire Administrator stated that the January 11, 2000, meeting was not a meeting of the Commission. Rather, it was a meeting that he held, in his capacity as Fire Administrator, with “representative members of competing career and volunteer factions.” He was concerned that the proposed changes in the IECS were “being defined as a career versus volunteer issue.” In meeting with the two career and two volunteer representatives who serve on the Commission, he was “[acting] to determine why the issue was being debated along career versus volunteer lines, and [attempting] to defuse emotions and discuss the issues with a minimum of bitter feelings between the two groups.” At a previous retreat, a suggestion had been made by one of the commissioners that the career and volunteer representatives meet to discuss general issues of mutual concern. At least one of the attendees viewed the January 11 meeting as consistent with this goal.

Apparently, discussion started with a dialogue about relations between career and volunteer personnel – as described by a participant, a conversation about “how we do business and how we can get along.” Later, the discussion “migrated” to the specific topic of the IECS. The Fire Administrator sought to find out why a portion of the proposal was so controversial. As he made clear in his response to the Compliance Board, however, he never contemplated any decision making concerning the IECS at the July 11 meeting. Indeed, he believed that, with only four voting members present, amending the IECS was then impossible.<sup>6</sup>

The dinner gathering on January 13 was an informal affair (pizza and soft drinks in a conference room), open to the entire Commission as well as staff. In his response, the Fire Administrator described the event as a “social gathering, to increase camaraderie among [Commission] members.” In his view, it was not a “meeting” for purposes of the Act. “The only mention ... of the proposed IECS regulation amendment was during the last five-to-ten minutes of the dinner,” during which the Fire Administrator indicated that he “would introduce the amendment as proposed by the Operations Committee. He asked the group if they would agree that he then would allow the five recognized resource groups to comment ... and, after discussion, possibly seek or suggest compromise positions.” Apparently, no Commission member objected to the process outlined. The Fire Administrator indicated that his statement concerning how he would conduct the meeting, part of his statutory responsibilities, constituted performance of an executive function to which the Act does not apply.

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<sup>6</sup> See note 7 below and accompanying text.

### III

#### Analysis

##### *A. January 11, 2000 Meeting*

Under the Open Meetings Act, a meeting occurs when a quorum of a public body convenes for the consideration or transaction of public business. §10-502(g). There is no question that the IECS was discussed at the meeting on January 11. Under the Act, adoption of a revised IECS constituted a quasi-legislative function; unless a statutory exception applied, the entire process related to its consideration was required to be open to public scrutiny, whether or not a final decision about it was contemplated at a particular meeting. As we have explained, even “information-gathering at the earliest stages of policy formation is part of the ‘consideration ... of public business.’ The questions posed, the answers given, the members’ passing comments and observations – all are important parts of the process by which a public body ultimately comes to its decision.” Compliance Board Opinion 93-2 (January 7, 1993), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 23, 27. And as the Court of Appeals has observed, “every step of the process ... constitutes the consideration or transaction of public business.” *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A. 2d 1070 (1980).

This fundamental point about the Open Meetings Act cannot be avoided by the contention that the Fire Administrator was acting in his capacity as head of the Fire and Rescue Service rather than as chairman of the Commission. To be sure, we have previously recognized that in some situations a majority of members of a public body, in their individual capacities, may lawfully attend a meeting scheduled by an administrative official, provided that the members do not conduct public business as a group. *See* Compliance Board Opinion 94-9 (November 15, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 104, 105. In this case, however, under County law, the Fire Administrator is a member, albeit nonvoting, as well as the chairman of the Commission. Four of the seven voting members of the Commission were present for a discussion concerning the proposed IECS regulations, a matter scheduled to come before the full Commission. This group interaction about a Commission item of business invokes the Open Meetings Act, for in these circumstances neither the members nor the Chairman may shed their Commission identity as if it were an uncomfortable garment.

We recognize that County law requires at least five votes to amend the IECS. §21-8(a) of the Montgomery County Code. The fact that a supermajority vote might have been necessary to adopt the regulations in question, however, does not alter the fact that a meeting occurred.<sup>7</sup> The Act defines a “quorum” as “(1) a majority of the members of a public body; or (2) any different number that the law requires.” SG §10-502(k). A majority of the Commission discussed the IECS on January 11. The supermajority voting requirement is not a “different number that the law requires” for a quorum. To hold otherwise would unacceptably allow a simple majority of a public body to meet behind closed doors, without public oversight, on matters that are of sufficiently heightened public importance as to justify a supermajority voting requirement.

***B. January 13, 2000 Dinner***

The Fire Administrator indicated that the January 13, 2000, meeting was a social gathering rather than a meeting subject to the Act. He acknowledged that during the final five or ten minutes of the dinner session, he addressed his plans for presenting the IECS matter at the Commission’s meeting that evening. Discussion centered on the process that would be employed rather than the substance of the proposed regulation. In the Fire Administrator’s view, this discussion constituted an executive function.

The Fire Administrator is correct that a purely social gathering of a public body is not subject to the Act. §10-503(a)(2). Indeed, we have recognized “the frequent, and entirely permissible, practice of public bodies to gather socially, so as to make working relationships among the members more cordial.” Compliance Board Opinion 98-2 (April 1, 1998), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 5, 7. For example, a quorum of a public body may eat together in private, provided they refrain from conducting public business during that time. *See, e.g.*, Compliance Board Opinion 99-13 (August 26, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 74, 76. *Id.* We have also recognized that members of public bodies who are socializing often make stray comments relating to public business. Such events or stray comments do not violate the Act. We have also emphasized, however, that we deem it “an impermissible circumvention of the Act for a public body to use ... an informal gathering as a device to script discussion at the following meeting, to set the agenda for discussion, or to discuss the merits of any matter that is to be dealt with at the meeting proper.” Compliance Board Opinion 94-6 (August

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<sup>7</sup> Discussion at the informal conference suggested that the supermajority requirement might not have applied in that the Commission was considering a new policy rather than an amendment to the existing IECS. Because we do not view the supermajority requirement under the County ordinance as altering the Commission’s normal quorum requirement for purposes of the Act, this issue does not affect our analysis.

16, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 92, 94. See also Compliance Board Opinion 96-3 (April 9, 1996), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 157 (“[T]he Act does not permit the formation of [a public body’s] agenda, or any discussion of an agenda item, at a closed luncheon meeting.”).

In the meeting at issue, the IECS was already scheduled on the agenda for that evening’s meeting, and we accept the Fire Administrator’s representation that the merits of the IECS matter were not mentioned at the dinner. Nevertheless, the Fire Administrator, who serves as chairman of the Commission, used the dinner session to advise the other members of the Commission on how the IECS regulations would be addressed at the Commission’s meeting later that evening. Other members of the Commission apparently acquiesced in the process he suggested. It is obvious that the manner in which an agenda item is handled, and the order in which participants may present their positions, can have a marked effect on the decision-making process of a public body. As we explained in connection with a legislative function, “[n]o part of [the] process, including ... the procedures for [an ordinance’s] enactment, could permissibly be carried out in a closed session unless one of the specific exceptions in the Act were applicable.” Compliance Board Opinion 93-6 (May 18, 1993), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 35, 36.

The Commission’s consideration of the IECS was a quasi-legislative function rather than a legislative function.<sup>8</sup> But the application of the Act is the same. In this case, the Fire Administrator discussed with the other Commission members how the proposed IECS revision would be handled in a meeting scheduled that evening. None of the Act’s exceptions applied. Because this discussion occurred outside of an open session, this discussion violated the Act. §10-505.

## **IV**

### **Conclusion**

When the Fire Administrator met in a private session with four voting members of the Commission on January 11, 2000, and the proposed IECS regulations were discussed, the session became a Commission meeting in violation of the Open Meetings Act. The January 13 dinner was primarily a social gathering rather than a meeting subject to the Act. However, when the discussion turned to

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<sup>8</sup> Hence, the Fire Administrator’s suggestion that this discussion constituted an executive function is incorrect. By definition, no part of the quasi-legislative process may be considered an executive function. §10-502(d)(2)(v).

the manner in which the Chairman would present the IECS at the public meeting that evening, a violation occurred.

OPEN MEETINGS COMPLIANCE BOARD

*Walter Sondheim, Jr.*  
*Courtney McKeldin*  
*Tyler G. Webb*